United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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Court of Appeals, District of Columbia

APRIL TERM, 190

590

No. 2011.

No. 5, SPECIAL CALENDAR.

JERRY FLEMING, PLAINTIFF IN ERROR,

vs.

DISTRICT OF COLUMBIA.

IN ERROR TO THE POLICE COURT OF THE DISTRICT OF COLUMBIA.

FILED APRIL 23, 1909.

Court of Appeals, District of Columbia

APRIL TERM, 1909.

No. 2011.

No. 5, SPECIAL CALENDAR.

JERRY FLEMING, PLAINTIFF IN ERROR,

vs.

DISTRICT OF COLUMBIA.

IN ERROR TO THE POLICE COURT OF THE DISTRICT OF COLUMBIA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 27, 1909.

In the Court of Appeals of the District of Columbia.

No. 2011.

JERRY FLEMING, Plaintiff in Error,
vs.
DISTRICT OF COLUMBIA.

a In the Police Court of the District of Columbia, April Term, 1909.

No. 335,085.

DISTRICT OF COLUMBIA
vs.
JERRY FLEMING.

Information for Vagrancy.

Be it remembered, That in the Police Court of the District of Columbia, at the City of Washington, in the said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above entitled cause, to wit:

[Seal Police Court of District of Columbia.]

1 (*Information.*)

In the Police Court of the District of Columbia, March Term, A. D. 1909.

DISTRICT OF COLUMBIA, *ss:*

Edward H. Thomas, Esq., Corporation Counsel, by James L. Pugh, Jr., Esq., Assistant Corporation Counsel, who for the District of Columbia prosecutes in this behalf in his proper person, comes here into Court and causes the Court to be informed, and complains that Jerry Fleming, late of the District of Columbia, on the 3rd day of March, in the year nineteen hundred and nine, at and within the District of Columbia, was then and there, and has been ever since that day, and still is a vagrant, to wit: an idle person; a person without visible means of support; a person repeatedly in and about the streets, avenues, alleys, roads, and highways, and leading an idle and immoral life, found repeatedly loitering in and around tippling houses on said streets and avenues, contrary to and in violation of an Act of Congress entitled "An Act to amend an Act for the pres-

ervation of the public peace and the protection of property in the District of Columbia," approved July 8, 1898, amended March 3rd 1909, and constituting a law of said District.

[Seal Police Court of District of Columbia.]

EDWARD H. THOMAS,
Corporation Counsel.

(Signed) By J. L. PUGH, JR.,
Assistant Corporation Counsel.

Sworn to before me by J. H. Lee on this 26th day of March, 1909.
(Signed) H. C. HOPKINS,
Deputy Clerk of the Police Court of the District of Columbia.

2 In the Police Court of the District of Columbia.

Criminal, No. 335,085.

DISTRICT OF COLUMBIA
vs.
JERRY FLEMING.

Bill of Exceptions.

Be it remembered that on the trial of this cause had on the 30th day of March, A. D. 1909, the defendant being charged and tried upon the Information for vagrancy, pleaded not guilty to said charge, thereupon, the District of Columbia, in order to maintain the issue on its part joined, offered the witness, GEORGE WILSON, who testified in substance, that on the evening of March 6th, 1909, about 9 o'clock, the defendant followed him, (witness), from 9th and Penn. Avenue to an alley at 3rd and Penn. Avenue, and as he, (witness), went into the alley for the purpose of getting his horse and carriage from the stable, he being a hackman by trade, he left the defendant and another colored man standing at the mouth of the alley, and when witness came out, the defendant and the man accompanying him, followed him, (witness), from the alley to 9th and Penn. Avenue, and that defendant hissed at him on the way. On arriving there witness asked the defendant what he wanted, what he was following him for. Defendant replied by asking witness if he wanted to do business, and invited him into a lumber yard. Witness then got off his carriage and chased the defendant, who was overtaken and arrested. Witness had only seen the defendant once or twice before on the Avenue; had no knowledge of where he worked; did not know whether he worked or not, or what his past life had been.

3 The District of Columbia, in order to maintain the issue on its part joined, offered the witness, WILLIAM MAIN, who testified:—That he and the witness, Wilson, had just come in from Virginia on the Mount Vernon car, and got off at 12th and Penn. Avenue, and when they got to 3rd and Penn. Avenue, just as they were about to enter the alley where witness, Wilson, kept his horse

and carriage, he saw the defendant and another man standing at the alley. When witness and Wilson came out of the alley with the team which belonged to Wilson, they found the defendant and another light colored man still standing at the mouth of the alley, and the defendant holloaed, "Hello blonnie," and "Oh, you kid," and whistled at them and then proceeded to follow them up to 9th and Penn. Avenue. Witness was in a carriage. When they got to 9th and Penn. Avenue near the theater, the defendant came up and began to talk with them, whereupon Wilson asked defendant what he wanted. Defendant replied, "Do you want to do business?" and invited the witness into a lumber pile. Witness then chased the defendant and had him arrested. Witness did not know the defendant, what his occupation was, and had never seen him before; did not know whether defendant worked; did not know whether he could give account of himself; never heard of his having committed any offense and as a matter of fact knew nothing about him except the facts as testified to.

The last witness offered by the District of Columbia was Officer J. H. LEE, who testified in substance that he found these men chasing the defendant and that the defendant ran into his arms, whereupon he arrested him; that he had never seen defendant before he arrested him. Here the District of Columbia rested.

And whereupon counsel for the defendant moved the Court to discharge the defendant upon the following grounds:

4 First. Because of insufficient evidence to sustain the charge of vagrancy as set forth in the Information, and

Second. Because the only evidence offered against defendant in support of any of the several distinct charges of vagrancy as set forth in the Information, was the testimony of two witnesses, which said witnesses only testified to one act, or attempted act, neither of which did constitute the charge of vagrancy, under the law covering such offenses in the District of Columbia. The said motion was overruled by the Court and the defendant, through his counsel, did then and there note exception to the ruling of the Court and gave his proper notice of applying for a writ of error to the Court of Appeals for said District.

Thereupon the defendant, in order to maintain the issue on his part joined, produced and offered the following witness, FRANK DUNNINGTON, who testified in substance as follows:

That he lived at No. 915 Eye St., N. W., and was employed as cook in a boarding house there, and had been employed for a long time; that he was well acquainted with the defendant, Jerry Fleming, and had been for many years; that the defendant lived in Anacostia with his parents, but worked at No. 1105 K St., N. W., at a boarding house as cook, and had been employed there constantly for more than two years, and so far as he knew or ever heard, the defendant had never been arrested before. That on the evening of March 6, he met the defendant at 7th and Penn. Avenue; that he does not remember seeing either of the witnesses, George Wilson, William Main, or J. H. Lee, who testified against the defendant in this case on the evening in question; that it is not true that he and

the defendant followed these men down to 3rd and Penn. Avenue, nor is it true that he or the defendant on that evening holloaed "Hello, blonnie," or "Oh, you kid," and defendant did not ask the said witnesses if they wanted to do business, or anything suggestive of an immoral nature, or make any other statement in his presence; that they separated about 9.15 P. M. o'clock, and that he never saw the defendant any more until the next day in Court.

Another witness offered by the defendant was MARY R. FLEMING, mother of the defendant, who testified that her son had a good home, that he lived with her in Anacostia, was 21 years of age, was never arrested before, and for over two years had been employed as a cook at a boarding house kept by Mrs. Conway, on K St., N. W., and that he was not an idle person, that he did not drink, he did not loiter around tippling houses, that he was able to give a good account of himself, and that he was a model boy, so far as his past life was concerned.

Thereupon the defendant in his own behalf took the stand and testified in substance as follows:

That on the evening of March 6, 1909, about 8.30 o'clock he left his place of business, where he is employed, and went down to 7th and Penn. Avenue, where he met the witness, Frank Dunnington, by engagement; that he and said Dunnington, proceeded up Penn. Avenue to 9th St., where they stood and talked awhile and then separated. After said witness left him, and while he was standing near Bijou Theater, two white men approached him and asked what he was doing standing there. Thereupon he informed them that they had nothing to do with him, and one word brought on another, whereupon one left the carriage and chased him with a whip, and he ran, and in running he came into the arms of the witness, J. H. Lee, a police officer, who put him under arrest. He denied that he had followed the witnesses for the prosecution, as testified to by them, down Penn. Avenue to 3rd St. and back to 9th St. and Penn. Avenue, and denied that he had used the words, "Hello, blonnie," or "Oh, you kid," as testified by the witnesses in the prosecution, or that he asked said witnesses whether they wanted to do business, or that he invited them to a lumber pile or to any other place. That he has been employed for two years continuously and still is employed as cook, and receives as wages $17.00 a month. Here the defendant rested, and the case was submitted upon the foregoing facts and the Court adjudged the defendant guilty as charged in the Information.

And whereupon counsel for the defendant moved the Court in arrest of judgment and for a new trial upon the following ground:

First. Because the judgment of the Court was contrary to the law governing the case.

Second. Because of insufficient evidence to sustain the charge of vagrancy as set forth in the Information filed in this cause.

Third. Because said Information is founded upon the act of Congress of July 8, 1898, which act was repealed by the Act of Congress

of March 3, 1909, so far as the law of vagrancy is concerned in the District of Columbia.

Fourth. Because said Information, upon which the defendant was convicted, does not charge any offense either under the Act of Congress of July 8, 1898, or under the amended Act of March 3, 1909, and hence the conviction is void.

Fifth. Because the Act of Congress of March 3, 1909, is unconstitutional and void and that it deprives the accused of the right of trial by a jury and yet gives the trial judge power and authority to sentence him to imprisonment for a term of one year or require him to give bond for a period of one year for good behavior.

The Court heard the argument on said motion on April 3rd
7 and overruled said motions and the defendant did then and there, through his counsel, note exceptions to the rulings of the Court, which said exceptions were duly noted at the time the same was taken and notice thereof given of an intention to apply to the Court of Appeals for a writ of error, and all of the exceptions, taken as aforesaid, are signed this 6th day of April, 1909.

Whereupon the defendant was sentenced to give bond in the sum of Three Dundred Dollars, in default to be committed to the workhouse for the period of ninety days.

(Signed) I. G. KIMBALL,
Judge of Police Court, D. C.

8 (*Copy of Docket Entries.*)

In the Police Court of the District of Columbia, March Term, A. D. 1909.

No. 335,085.

DISTRICT OF COLUMBIA
vs.
JERRY FLEMING.

Information for Vagrancy.

Friday, March 26, 1909.—Continued to March 30, 1909. Recognizance in the sum of $300 entered into to appear in the Police Court, D. C., William W. Stewart, surety.

Defendant arraigned Tuesday, March 30, 1909: Plea: Not guilty.

Exceptions taken to the rulings of the Court on matters of law and notice given by defendant in open Court, at the time of the several rulings, of his intention to apply to a Justice of the Court of Appeals of the District of Columbia for a writ of error.

Motion for a new trial and in arrest of judgment filed. Continued to April 3, 1909.

April 2, 1909.—Bill of exceptions presented to the Court.

April 3, 1909.—Motion for a new trial and in arrest of judgment argued and overruled.

Continued to April 5, 6, 1909.

Tuesday, April 6, 1909.—Judgment: Guilty. Sentence: To give security in the sum of three hundred dollars for good behavior and industry for the period of one year, and in default of said security, to be committed to the workhouse for the term of ninety days.

Bill of exceptions settled, signed, sealed and filed.

Recognizance in the sum of three hundred dollars entered into on writ of error to the Court of Appeals of the District of Columbia upon the condition that in the event of the denial of the application for a writ of error, the defendant will, within five days next after the expiration of ten days, appear in the Police Court and abide by and perform its judgment, and that in the event of the granting of such writ of error, the defendant will appear in the Court of Appeals of the District of Columbia and abide by and perform its judgment in the premises; William W. Stewart, surety.

Thereupon proceedings stayed for ten days.

April 13, 1909.—Writ of error received from the Court of Appeals of the District of Columbia.

9 In the Police Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, N. C. Harper, Deputy Clerk of the Police Court of the District of Columbia, acting in the absence of the Clerk, do hereby certify that the foregoing pages, numbered from 1 to 8 inclusive, to be true copies of originals in cause No. 335,085 wherein the District of Columbia is plaintiff and Jerry Fleming defendant, as the same remain upon the files and records of said Court.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court, — the City of Washington, in said District, this 23rd day of April, A. D. 1909.

[Seal Police Court of District of Columbia.]

N. C. HARPER,
Deputy Clerk Police Court, Dist. of Columbia.

10 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable I. G. Kimball, Judge of the Police Court of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Police Court, before you, between District of Columbia, plaintiff, and Jerry Fleming, defendant, Information No. 335,085, a manifest error hath happened, to the great damage of the said defendant as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the

Court of Appeals of the District of Columbia, together with this writ, so that you have the same in the said Court of Appeals, at Washington, within 15 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Seth Shepard, Chief Justice of the said Court of Appeals, the 13th day of April, in the year of our Lord one thousand nine hundred and nine.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Allowed by
SETH SHEPARD,
Chief Justice of the Court of Appeals of the District of Columbia.

[Endorsed:] Filed Apr. 13, 1909. F. A. Sebring, Clerk Police Court, D. C.

Endorsed on cover: District of Columbia police court. No. 2011. Jerry Fleming, plaintiff in error, *vs.* District of Columbia. Court of Appeals, District of Columbia. Filed Apr. 23, 1909. Henry W. Hodges, clerk.

IN THE

Court of Appeals, District of Columbia.

APRIL TERM, 1909.

No. 2011.

No. 5, SPECIAL CALENDAR.

JERRY FLEMING, PLAINTIFF IN ERROR,

vs.

DISTRICT OF COLUMBIA.

BRIEF OF APPELLANT.

THOMAS L. JONES,
MARION T. CLINKSCALES,
Attorneys for Plaintiff in Error.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C.

IN THE

Court of Appeals, District of Columbia.

APRIL TERM, 1909.

No. 2011.

No. 5, SPECIAL CALENDAR.

JERRY FLEMING, PLAINTIFF IN ERROR,

vs.

DISTRICT OF COLUMBIA.

BRIEF OF APPELLANT.

Statement of the Case.

The plaintiff in error was tried and convicted in the Police Court, March 30, 1909, upon an information charging him with being a vagrant, and the information set forth that plaintiff in error,

"On the 3" day of March, in the year nineteen hundred and nine, at and within the District of Columbia, was then and there, and has been ever since that day, and still is a vagrant, to wit; an idle person; a person without visible means of support; a person repeatedly in and about the streets, avenues, alleys, roads and highways, and leading

an idle and immoral life, found repeatedly in and around tippling houses on said streets and avenues, contrary to and in violation of an act for the preservation of the public peace and the protection of the property in the District of Columbia, approved July 8", 1898, amended March 3", 1909, and constituting a law of said District." (Rec., 1-2.)

The District of Columbia, at the trial of the case, produced three witnesses to maintain the issues on its part joined. The first witness (George Wilson) testified that on the evening of March 6, 1909, about 9 o'clock p. m., defendant followed him from Ninth street and Pennsylvania avenue to an alley at Third street and Pennsylvania avenue, and as he went into the alley to get his horse from the stable he left the defendant and another man standing at the mouth of the alley, and when he came out defendant and the other man followed him (witness) from the alley to Ninth street and Pennsylvania avenue; that defendant hissed at him on the way. On arriving there witness asked defendant what he wanted; defendant replied by asking witness if he wanted to do business and invited him into a lumber yard. Witness then got off his carriage and chased defendant until he was arrested. Witness had only seen defendant once or twice before on the avenue; had no knowledge where he worked or what his past life had been. The second witness for the District (William Main) testified substantially to the same effect as Wilson, excepting that when he and Wilson came out of the alley with their horse and carriage the defendant with another light colored man hallowed, "Hello, Blonnie," and "Oh, you Kid," and whistled at them. Witness did not know the defendant, had never seen him before and knew nothing of defendant except what occurred that night. The last witness was officer J. H. Lee, who said he found the two witnesses, Wilson and Main, chasing defendant, that defendant ran into his arms and that he had never seen defendant until he arrested him. (Rec., pp. 2-3.) This was all the testimony offered by the District.

Thereupon counsel for defendant moved the court to discharge the defendant, first, because of the insufficiency of evidence to sustain the charge as set forth in the information, and, second, because the only evidence offered against defendant in support of any of the several distinct charges of vagrancy as set forth in the information was the testimony of the two witnesses, which said witnesses only testified to one act, or attempted act, neither of which constituted the charge of vagrancy under the law covering such offenses in the District of Columbia. The court overruled said motion and exceptions were noted. (Rec., p. 3.)

The defendant, in order to maintain the issue on his part joined, produced three witnesses with himself. The first witness (Frank Dunnington) testified that he had been for several years well acquainted with the defendant; that defendant was at the time and had been for more than two years employed at No. 1105 K street northwest; he had never heard of defendant being arrested before; that on March 6, 1909, he met defendant at Seventh street and Pennsylvania avenue; he did not remember seeing any of the witnesses who testified against defendant on the evening in question; that he and defendant did not follow two men down to Third street and Pennsylvania avenue, nor was it true that he or the defendant on the evening aforesaid hallowed, "Hello, Blonnie," or "Oh, you Kid," and it is not true that defendant asked said witnesses if they did not want to do business or make any other remarks to them in his presence; that he and defendant separated at Ninth street and Pennsylvania avenue about 9.15 p. m., and he never saw defendant any more until the next day in court.

The next witness (Mary R. Fleming) testified that defendant lived in Anacostia, had a good home, is 21 years of age, never arrested before and had been employed as a cook in a boarding house on K street northwest for two years, did not drink or loiter around, but was a model boy and was her son. (Rec., pp. 3-4.)

The defendant in his own behalf testified that on the evening of March 6, 1909, he left his place of employment about 8.30 p. m., and went down to Seventh street and Pennsylvania avenue northwest, where he met Frank Dunnington by engagement; that he and said Dunnington proceeded up Pennsylvania avenue to Ninth street, where they stood and talked for awhile and then separated. After leaving Dunnington and while standing near Bijou Theater two white men approached him and asked what he was standing there for; defendant informed them that they had nothing to do with him, and one word brought on another. One of the men left the carriage and chased him with a whip until he ran into the arms of a policeman, who placed him under arrest. Defendant denied he followed the witnesses for the prosecution up or down Pennsylvania avenue and denied using the words "Hello, Blonnie," or "Oh, you Kid," or that he asked them to a lumber pile to do business or any other place. Defendant further testified that he had been employed for two years continuously as cook and received as wages $17 per month. (Rec., p. 4.)

This was all of the testimony offered by defendant. The case was submitted upon all the testimony offered and the court adjudged defendant guilty as charged in the information.

Counsel for defendant moved the court in arrest of judgment and for a new trial upon the following grounds: (*a*) Because the judgment of the court was contrary to the law governing the case; (*b*) Because of insufficient evidence to sustain the charge of vagrancy as set forth in the information; (*c*) Because said information is founded upon the act of Congress of July 8, 1898, which act was repealed by the act of Congress of March 3, 1909, as far as the law of vagrancy is concerned in the District of Columbia; (*d*) Because said information does not charge any offense either under the act of March 3, 1909, or under the act of July 8, 1898, and hence the conviction is void; (*e*) And because the

act of March 3, 1909, is unconstitutional and void, in that it deprives the accused of the right of trial by jury, yet gives the trial judge power and authority to sentence him to imprisonment for a term of one year or require him to give bond for a period of one year for his good behavior.

The court overruled this motion and exceptions were noted. Thereupon the defendant was sentenced to give bond in the sum of $300, in default to be committed to the workhouse for the period of ninety days. (Rec., pp. 4-5.)

Recognizance was given in the sum of three hundred dollars in compliance with the rules of the court, and the case is now here for review. (Rec., p. 6.)

Assignments of Error.

I.

The court erred in overruling the motion to discharge defendant after the prosecution had rested.

II.

The court erred in finding the defendant guilty as charged in the information.

III.

The court erred in overruling the motion in arrest of judgment.

ARGUMENT.

First. The law gives the defendant the right to demur to the evidence offered by the prosecution when such evidence does not sustain or is at variance with the allegations set forth in the indictment or information.

The motion in this case is in the nature of a demurrer to the evidence. The record shows that no evidence was offered to prove plaintiff in error was "an idle person," a "person without visible means of support, a person leading an idle and immoral life, found repeatedly in and around tippling houses." The only thing suggestive of proving any of the several elements that Congress has defined as constituting the offense of vagrancy was the testimony of two witnesses, and their evidence was a faint and feeble inference that plaintiff in error was a person leading an idle and immoral life, which is a part of one of the elements of vagrancy under the act of March 3, 1909.

If this element, embraced in one of the classifications of the vagrancy act of March 3, 1909, constitutes vagrancy, then the only evidence of record to maintain it is "Hello, Blonnie," and "Oh, you Kid," and an invitation into the lumber yard to do business.

A statute defining what shall constitute a felony or misdemeanor must be strictly construed. In the case of The People *vs.* Forbes the court said:

"Because a person was idle does not necessarily follow that he is a vagrant," and this opinion says further that "While these acts are constitutional, they should be construed strictly and executed carefully in favor of the liberty of the citizen."

(Supreme Court) 4 Park Crim. Rep. (N. Y.), 611; Taylor *vs.* State, 59 Ala., 19; State *vs.* Maxcy, 1 McMull (S. C.), 501; *In re* Jordan, 90 Mich., 3.

"Statutes must always be construed to have a reasonable effect agreeable to the intention of the Legislature, especially if the language be obscure and dubious."

Richards *vs.* Doggett, 4 Mass., 550; Gore *vs.* Brozier, 3 Mass., 539-40.

In the light of the testimony offered before the motion was made to discharge plaintiff in error, and the authorities here cited, it is contended that the lower court erred in overruling said motion.

If the words "Hello, Blonnie," and "Oh, you Kid," used once constitute an immoral person, then isn't it fair to presume that a man who uses profanity once in a public street directed to a stranger or any other person is an immoral person and therefore a vagrant? The information uses the word "repeatedly," but the proof fails to show that plaintiff in error was found repeatedly in the streets, etc., idle and leading an immoral life and without visible means of support.

To invite a man into a lumber yard to do business will not make a person a vagrant even if the statute is not strictly construed and executed carefully in favor of the liberty of the citizen, because there is nothing of an immoral nature in the alleged invitation, and the accused is always entitled to the reasonable doubt even if a person may think it immoral.

Second. The court erred in finding defendant guilty as charged in the information.

The plaintiff in error, according to the record on pages 3 and 4, adduced evidence denying he was "an idle person; a person without visible means of support; a person repeatedly in and about the streets, avenues," etc., or was of the character of such person described in the information. The evidence was conclusive on that point, and if it be contended that in order to avail himself of his rights raised by the motion to discharge, he should have rested his case there and

stood on the motion if he intended to have this court to review the proceeding, and by not doing this he waived his rights; we respectfully call the court's attention to its decision in the case of Nelson *vs.* United States. In that case the court, speaking upon this point, said:

"It would be a harsh rule to apply, provided the defendant was found guilty, to say that a defendant, by the introduction of such testimony, waived a motion that he be discharged from custody and the charge dismissed because the evidence was insufficient to prove the charge." It was said further by the court that "a defendant in criminal proceedings does not waive a motion to dismiss the charge because of the insufficiency of the evidence by introducing evidence tending to show his good character and the necessities of his family." (28 App. (D. C.), 32-37.)

All of the testimony offered by the plaintiff in error was such that went to his character and supported the very reasons urged in the motion to discharge him from custody and dismiss the charge.

Third. The court erred in overruling the motion in arrest of judgment.

The language used in the information setting forth the charge of vagrancy, upon which appellant was tried, is substantially that embraced in the act of Congress of July 8, 1898, which was repealed by the act of March 3, 1909. The act of July 8, 1898, reads as follows:

"That all vagrants and all idle and disorderly persons, persons of evil life or evil fame, persons who have no visible means of support, persons repeatedly drunk in or about any of the streets, alleys, avenues, roads, highways or public places within the District of Columbia, persons repeatedly loitering about tippling houses, all suspicious persons, all public prostitutes, and all persons who lead a lewd and lascivious course of life, shall upon conviction thereof be fined not to exceed $40 or shall be required to enter into security for their good behavior for a period of six months; said security shall be in the nature of a recognizance to the

District of Columbia, to be approved by the court, in a penalty not exceeding $500, conditioned that the offender shall not for the space of six months repeat the offense with which he or she is charged, and shall in other respects conduct themselves properly." (Police Reg., p. 95, sec. 8 of July 24, 1906, ed.)

It will be noted that this act does not attempt to define the offense of vagrancy, but simply enumerates certain distinct offenses without any attempt at a definition of any of them, and the only reference made to the law of vagrancy in the charge set forth in the information embraced in the act of March 3, 1909, are the words "Leading an immoral life," and this is used in a disconnected sense and omits to charge the essential elements that constitute the offense of vagrancy under the act of March 3, 1909. The information therefore charges no offense and appellant should have been discharged.

It was never intended by the act of Congress, March 3, 1909, that "leading an immoral life" was to be made a crime in itself. The language of the act defining what shall constitute the crime of vagrancy in the District of Columbia is as follows:

"Idle persons who, not having visible means of support, live without lawful employment; persons wandering aboard and visiting tippling shops or houses of ill fame, or lodging in groceries, outhouses, market places, sheds, barns, or in the open air, and not giving a good account of themselves; persons wandering abroad and begging, or who go about from door to door, or place themselves in the streets, highways, passages or other public places to beg or receive alms.

"All persons leading idle, immoral, or profligate life, who have no property to support them and who are able of body to work and do not work, including all able-bodied persons without other visible means of support who shall live in idleness upon the wages or earnings of their mother, wife, or minor child or children.

"Every person known to be a pickpocket, thief, burglar, or confidence operator, either by his own confession or by his having been convicted in the District of Columbia or elsewhere of either of such offenses, and having no visible or

lawful means of support, when found loitering around in any building, park, highway, street, avenue, alley, or reservation, steamboat landing, railroad depot, station, banking institution, broker's office, place of amusement, room, store, shop, public place, or car, omnibus, or other vehicle, or at any public gathering or assembly.

"Persons upon whom shall be found any instrument, tool or other implement used for the commission of burglary or the commission of any other crime against property, or for picking locks or pockets, who shall fail to give a good account of the possession of the same, and all persons who by the common law are vagrants whether embraced in any of the aforegoing classifications or not." (Public Act 303, pp. 26-27.)

A common law vagrant is

"A person, who, being able to work, refuses to do so, but lives idly, or roams from place to place, begging or living without labor or visible means of support."

28 Amer. & Eng. Encyc. Law (1st ed.), p. 36.
2 Bouv. Law Dict., 1187.
2 Chit. Stat., 145.
2 Abbotts, 625.

In this case before us the information charged the appellant with being "an idle person, a person without visible means of support;" it does not say nor does it attempt to charge him with living without lawful employment. A person idle and not having visible means of support is not within the definition of vagrancy. It must go further and charge the accused as "living without lawful means of support." The information further charges that appellant was "a person repeatedly in and about the streets, avenues, alleys, roads, and highways, and leading an idle and immoral life," but fails to allege that he had no property to support himself, or that he was able to work and did not work, and it was alleged in the information that he "was found repeatedly loitering in and around tippling houses on said streets and avenues," but fails to allege that he did not or could not give a good account of himself, or that he was able to work and

did not work, or that he had no property upon which he supported himself.

The information attempted to charge appellant under three of the five classifications set forth in the definition of vagrancy, namely, "an idle person, a person without visible means of support," in the first class; "a person repeatedly in and about the streets, avenues, alleys, roads, and highways, and leading an idle and immoral life" in the second class; "and found repeatedly loitering in and around tippling houses on said streets and avenues" in the third class. Had the information gone further and alleged that appellant lived without lawful employment, and not giving a good account of himself, the charge would have been complete as to the first classification. Had the pleader gone further and added, "Who had no property to support him, and who was able to work and did not work," the charge would have been sufficient under the second classification. And had the information set forth that the accused was known to be a pickpocket, thief, burglar or confidence operator," or any of the other elements in the third classification, he would then know what he was to meet.

"An indictment or information must aver facts which bring the accused within some of the causes or definitions of the statute which constitutes the offense, otherwise it would not state the offense in plain and intelligible words or apprise the defendant what he is expected to meet."

Walton *vs.* the State, 12 Texas App., 117.

The accused had the right to know which one of the three offenses he was called upon to meet and the facts which constituted the offenses.

"Even in the cases of misdemeanors the indictment must be free from all ambiguity, and leave no doubt in the mind of the accused and the court of the exact offense intended to be charged, not only that the former may know what he is called upon to meet, but that, upon a plea of former acquittal or conviction, the record may show with accuracy the exact offense to which the pleas relates."

Evans *vs.* United States, 153 U. S., 587.

The accused could not plead a formal acquittal of the charges set forth in the information in question, nor would the record show the exact offenses in the classifications of vagrancy, which he was found guilty of committing.

Although this is a misdemeanor the law does not permit the liberties of persons to be jeopardized by simply grouping several words together out of the several definitions in the several classifications that constitute vagrancy and leaving out of each definition in the classifications the essential elements that constitute the offense.

"It is an elementary principle of criminal pleading, that where the definition of an offense, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must descend to particulars." (Arch. Cr. Pr. & Pld., 291.)

"The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for prosecution for the same for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated not conclusions of law. A crime is made up of acts and intent; and these must be set forth in the indictment with reasonable particularity of time, place and circumstances." (United States *vs.* Cruikshank, 92 U. S., 542, and United States *vs.* Hess, 124 U. S., 483-86.)

Applying the authorities quoted in this case in reference to the definition of vagrancy, and how the offense was alleged in the information, it will be seen that no offense under the present vagrancy act was charged, hence the conviction is void.

The vagrancy act of March 3, 1909, is unconstitutional, because it increases the punishment in such cases and denies to the accused the right to trial by jury. After defining the offense it says:

"That every person in the District of Columbia, who shall be convicted of vagrancy under the provisions of this act shall be required to enter into security in the sum of not exceeding five hundred dollars, conditioned upon his good behavior and industry for the period of one year, and if he shall fail to give such security he shall be committed to the workhouse in said District for a term not to exceed one year. * * * All prosecution under this act shall be conducted in the same manner now provided by law for the prosecution of offenses against the laws and ordinances of the said District, but nothing contained in section forty-four of the Code of Law for the District of Columbia, shall be so construed as to create or give to the accused in prosecutions under this act, any right to trial by jury not existing by force of the Constitution of the United States." (Public act No. 303, p. 27.)

In order to ascertain whether Congress exceeded its power in denying to the accused the right to trial by jury in vagrancy cases, it is necessary to see how such cases were triable at common law and how a person accused of crime under the Constitution shall be tried. It is admitted that vagrancy at common law was triable without a jury before justices of the peace or police magistrates, and this was the law of this District before Congress legislated upon the subject and repealed the common law by statutory acts in two ways: 1st, by adding other elements to what constituted vagrancy at common law, and, 2nd, by increasing the punishment.

"A subsequent statute conferring in affirmative words larger or more restricted powers, granting wider or less extensive privileges, imposing a heavier or less grievous burden, or imposing different duties than were imposed in the same particular by a previous act, the old or new provisions being conflicting in their nature, operates to repeal the corresponding provisions of the earlier act."

1st ed., 23 Am. & Eng. Encyc. Law, pp. 483-84.
State *vs.* Whitworth, 8 Port (Ala.), 434.
State *vs.* Persinger, 76 Mo., 346.
Hays *vs.* State, 55 Ind., 99.

"A statute punishing a described act as a felony, is repealed by implication, by a subsequent statute making the same act a misdemeanor." (Hays *vs.* State, 55 Ind., 99.)

Elevating misdemeanors by adding new elements to constitute the offense and by increasing the punishment brings the offense within those classes of cases that the Constitution declares shall be tried by jury and *vice versa.* It was never intended by the framers of the Constitution to give unto Congress power to do by implication what it cannot do by expressed word or letter. It will not do to say that because an offense is a misdemeanor the accused is not entitled to a trial by jury.

"In the provision of the Constitution of the United States that the trial of all crimes shall be by jury, the term crime included misdemeanors the punishment of which might involve the deprivation of the liberty of the citizen. The court said: The third article of the Constitution provides for a jury in the trial of all crimes, except in cases of impeachment. The word crime, in its more extended sense, comprehends every violation of public law; in a limited sense, it embraces offenses of a serious or atrocious character. In our opinion, the provision is to be interpreted in the light of the principles which, at common law, determined whether the accused, in a given class of cases, was entitled to be tried by jury. It is not to be construed as relating only to felonies, or offenses punishable by confinement in the penitentiary. It embraces as well some classes of misdemeanors, the punishment which involves or may involve the deprivation of the liberty of the citizen. It would be a narrow construction of the Constitution to hold that no prosecution for a misdemeanor is a prosecution for a crime within the meaning of the third article, or a criminal prosecution within the meaning of the sixth amendment."

Callan *vs.* Wilson, 127 U. S., 549.

The increasing of punishment in this case certainly involves the deprivation of the liberty of the citizen without trial by jury and the act of Congress making vagrancy a statutory offense does away with the principles at common law, deter-

mining whether the accused in this case was entitled to trial by jury.

To say that Congress has the right to increase the elements that shall constitute the definition of vagrancy, or for any crime or misdemeanor under the common law and at the same time increase the punishment for a violation thereof, and thereby take away the liberty of the citizen without due process of law and without a trial by jury, is to hold that Congress has the right by implication to enact laws that are contrary to both the letter and the spirit of the third, fifth, and sixth articles of the United States Constitution.

The mere fact of increasing the punishment brings the offense within the provision of the Constitution relating to trial by jury. Punishment is as necessary to constitute a crime as a definition. In the case of People *vs.* McNulty the court said:

"A description of acts necessary to constitute a crime does not make the commission of such acts a crime; punishment is as necessary to constitute a crime as definition. Without either there is no crime, and the repeal of either leaves no crime. * * * A crime or public offense is an act committed or omitted in violation of a law forbidding or commanding it, and to which is annexed, upon conviction * * * punishment."

93 Cal., 427.

It has been held in this jurisdiction, as well as others, that where the accused has a right to an appeal from the court of original jurisdiction the right to a trial by jury has not been denied him, but in the Dana case the court said if the accused has been denied a trial by jury in a court which has jurisdiction to try him, it is unconstitutional.

In re Dana, 7 Benedict, 14. See also 8 Gray, 329-341.

In this jurisdiction the accused has no appeal from the police court, excepting by writ of error, and he is therefore denied not only the right to be tried by jury, but is also

denied the right to an appeal to a court where he could avail himself of the right to trial by jury.

We contend that the new vagrancy act is a criminal offense, and if our contention be disputed we offer the following authorities in support of our contention:

8 Amer. & Eng. Encyc. Law (2d ed.), pp. 248, 249, and 250.

In the case of the State *vs.* West, 42 Minn., p. 147, the court held in construing article 1 section 7 of the State Constitution that a person charged with violating a criminal ordinance is entitled to a trial by jury, because a violation of a criminal ordinance is a criminal offense.

The third article of the United States Constitution provides that, "The trial of all crime, except in cases of impeachment, shall be by jury." The fifth provides that no person shall "be deprived of life, liberty, or property without due process of law." And the sixth says that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and District wherein the crime shall have been committed."

The object of the framers of the Constitution was to not take the life or liberty of individuals without giving to them a fair and impartial trial by jury when charged with crime.

A statute may be within the inhibition of the Constitution as well by implication as by expression, and the act, namely, the vagrancy act, now in force in the District of Columbia, is within the inhibitions of the Constitution.

When a statute is against the plain and obvious principles of common right and common reason as guaranteed by the third, fifth, and sixth articles of the Constitution, and seeks to evade the principles which are prohibited by enactment into law, new elements to constitute crime and increasing new and more severe punishment for its violation, and then says that the accused shall not have a right to trial by jury, because under the common law he was not entitled to this right, it becomes an engine of mischief and should be de-

clared void, owing to its inconsistency with both the letter and spirit of the Constitution.

The Police Court of the District of Columbia, under the vagrancy act, has the power to sentence the accused to a term not exceeding one year in the workhouse, or to give bond in a sum not exceeding five hundred dollars for his good behavior and industry for a period of one year.

The penalty is twice that allowed under the old law and places upon the accused the hardship of securing bond for his good behavior for the period of one year in every case, which means to the majority of persons convicted under the act absolute imprisonment. Where an individual steals a loaf of bread, arrested and tried in court, he is entitled to a trial by jury, but where an individual, hungry and begs a sandwich, arrested and arraigned in court, he is denied the right to have a jury set in judgment in his case, and yet the man who steals is given a small fine or short term in prison and the man who begs is imprisoned absolute or quasi for a period of one year. Is there any power or authority expressed or implied in the Constitution that gives to Congress the right to legislate by amending the common law to such an extent as to make vagrancy more heinous than petit larceny, or carrying concealed weapons, or simple assault, etc.?

We believe that the vagrancy act is unconstitutional because of the facts and circumstances hereinbefore set forth and according to the authorities cited in s upport of our contentions.

And for the reasons assigned we believe that the Police Court erred in holding the appellant guilty as charged in the information, and also erred in overruling the motion in arrest of judgment, and we therefore ask that the judgment of the Police Court be reversed, and that the charge against appellant be dismissed.

Respectfully submitted,

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Attorneys for Plaintiff in Error.

Court of Appeals, District of Columbia

OCTOBER TERM, 1909.

No. 2011.

No. 5, SPECIAL CALENDAR.

JERRY FLEMING, PLAINTIFF IN ERROR,

vs.

DISTRICT OF COLUMBIA.

BRIEF ON BEHALF OF DEFENDANT IN ERROR.

EDWARD H. THOMAS,
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Attorneys for Defendant in Error.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C.

IN THE

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MOTION TO DISMISS.

Now comes The District of Columbia, the defendant in error, by its counsel, and moves the court to dismiss the appeal in this case upon the following grounds:

First. Because there were no valid exceptions taken by plaintiff in error to the rulings of the court upon which to base his writ of error.

Second. Because the alleged bill of exceptions of the plaintiff in error was not presented to the court within the time specified by the rules of this court.

EDWARD H. THOMAS,
FRANCIS H. STEPHENS,
Attorneys for The District of Columbia,
Defendant in Error.

Statement of the Case.

The plaintiff in error in this case was convicted in the police court April 6, 1909, and sentenced to give security in the sum of $300 for good behavior and industry for the period of one year, and in default of said security, to be committed to the workhouse for the term of ninety days, upon an information duly filed charging that the said plaintiff in error on the 3d day of March, 1909, at and within the District of Columbia, was then and there, and has been ever since that day and still is, a vagrant, to wit, an idle person; a person without visible means of support; a person repeatedly in and about the streets, avenues, alleys, roads, and highways, and leading an idle and immoral life, found repeatedly loitering in and around tippling houses on said streets and avenues, contrary to and in violation of an act of Congress entitled "An act to amend an act for the preservation of the public peace and the protection of property in the District of Columbia," approved July 8, 1898, amended March 3, 1909, and constituting a law of said District.

The testimony adduced at the trial, showing an invitation to commit an unnatural act, and the alleged exceptions of counsel on behalf of the plaintiff in error to the rulings of the court are set out in the record, which is a short one, and need not be recited here.

ARGUMENT.

I. On Motion to Dismiss the Appeal.

The court should not entertain this appeal because—

First. The record shows (p. 3) that at the close of the prosecution's testimony, and upon the court's refusal to discharge the defendant, on motion made by his counsel, the defendant thereupon proceeded with and put in his defense, the defendant thereby waiving his exception to the court's refusal to discharge.

> "An exception by the defendant to a ruling of the court at the close of the testimony for the prosecution is waived where the defendant takes testimony in defense."
>
> Trometer *vs.* D. C., 24 App. D. C., 242.
> Green *vs.* U. S., 25 App. D. C., 549.

The defendant put in his defense and the record discloses no subsequent exception duly noted by defendant up to this stage of the proceedings, and he had nothing upon which to found a bill of exceptions, April 2, 1909, when, the record discloses, he filed his bill of exceptions (p. 5). On March 30, 1909, he filed a motion for a new trial and in arrest of judgment, which, however, was not heard or acted upon until April 3, when it was overruled; before the said motion had been acted upon, to wit, on April 2, he filed his bill of exceptions. It is clear that such bill of exceptions could not relate to the matters contained in the motion for new trial and in arrest of judgment, because said motion was not decided until the day after the exceptions were presented to the judge of the police court.

The docket entries made by the clerk on the court record (p. 5) state: "Exceptions taken to the rulings of the court on matters of law and notice given by defendant in open court, at the time of the several rulings, of his inten-

tion to apply * * * for writ of error." This is a statement of the clerk, made on his docket apparently at the request of counsel to cure a defective record, because the bill of exceptions itself does not disclose any exceptions taken to any rulings of the court, except to the action of the court in overruling the motion in arrest and for a new trial. It is obvious that the mere statement by the clerk cannot supply the place of a proper bill of exceptions.

Second. Assuming that the various steps for perfecting this appeal in all other respects have been properly taken, yet it is submitted that the defendant did not present his bill of exceptions within the time allowed by paragraph 2 of rule XXV of this court. That rule provides:

> "To entitle a party to apply for writ of error (from the police court) he shall cause note of his intention to be made at the time of the ruling by the court; and he shall *within three days* thereafter present to the court a bill of exceptions properly prepared to present the ruling excepted to," &c., &c.

Defendant was tried March 30, 1909 (Rec., p. 5), and the bill of exceptions was not presented to the court until April 2, 1909. This was not *within three* days, as required by the above rule. It was *on the fourth* day.

This court has recently laid down the rule as to computation of time as follows: "Where computation of time is to be made from an act done, the day on which the act is done is to be included" (Macfarland *et al. vs.* Moore *et al.*, 32 App. D. C., 213, and cases cited in the opinion). In that case Congress, by act approved January 9, 1907, directed that "within thirty days after the passage of this act" the Commissioners should file a petition for condemning the land for the purposes mentioned therein. On February 8, 1907, the petition was filed On an issue squarely made and presented in said case for decision this court laid down the above-quoted rule for computing time. It is submitted that the case at bar is one to

which the same principle should be applied as to computation of time under said rule of this court.

> "The rules of this court regulating matters of appeals and preparation of the same for hearing have the force of law and are binding upon the court and suitors."
>
> D. C. *vs.* Roth, 18 App. D. C., 547.

Argument and Authorities on the Merits.

It is clear that the police court found from the evidence in this case that the defendant was a "moral pervert," and that he was a person leading an immoral or profligate life under the provisions of the statute of March 3, 1909, defining vagrancy.

It is submitted that the question of fact decided by the court below on the evidence adduced at the trial of this case is not reviewable by this court.

In Moore *vs.* District of Columbia, 12 App. D. C., p. 544, this court said:

> "By the act of Congress of March 2, 1897, providing for writs of error from this court to the police court of this District, this court has no power to review and decide upon the facts of the case."

The information in this case is sufficient. It is drawn in such a manner as to include offenses under the provisions of section 8 of the act of July 8, 1898 (30 Stats., 723), which reads as follows:

> SEC. 8. "That all vagrants, all idle and disorderly persons, persons of evil life or evil fame, persons who have no visible means of support, persons repeatedly drunk in or about any of the streets, avenues, alleys, roads, highways, or other public places within the District of Columbia, persons repeatedly loitering in or around tippling houses, all suspicious persons, all public prostitutes, and all persons who lead a lewd or lascivious course of life, shall upon conviction thereof be fined not to exceed forty dollars, or shall be re-

> quired to enter into security for their good behavior for a period of six months. Said security shall be in the nature of a recognizance to the District of Columbia, to be approved by the court, in a penalty not exceeding five hundred dollars, conditioned that the offender shall not, for the space of six months, repeat the offense with which he or she is charged and shall in other respects conduct themselves properly."

and that of vagrancy, as defined by a provision contained in the District appropriation act approved March 3, 1909, which reads as follows:

> "That the following-described persons in the District of Columbia are hereby declared to be vagrants:
>
> "Idle persons who, not having visible means of support, live without lawful employment; persons wandering abroad and visiting tippling shops or houses of ill fame, or lodging in groceries, outhouses, market places, sheds, barns, or in the open air, and not giving a good account of themselves; persons wandering abroad and begging, or who go about from door to door or place themselves in the streets, highways, passages, or other public places to beg or receive alms.
>
> "All persons leading an idle, immoral, or profligate life who have no property to support them and who are able of body to work and do not work, including all able-bodied persons without other visible means of support who shall live in idleness upon the wages or earnings of their mother, wife, or minor child or children.
>
> "Every person known to be a pickpocket, thief, burglar, or confidence operator, either by his own confession or by his having been convicted in the District of Columbia or elsewhere of either of such offenses, and having no visible or lawful means of support, when found loitering around in any building, park, highway, street, avenue, alley, or reservation, steamboat landing, railroad depot, station, banking institution, broker's office, place of amusement, room, store, shop, public place, or car or omnibus or other vehicle, or at any public gathering or assembly.

"Persons upon whom shall be found any instrument, tool, or other implement used for the commission of burglary or the commission of any other crime against property, or for picking locks or pockets who shall fail to give a good account of the possession of the same, *and all persons who by the common law are vagrants* whether embraced in any of the foregoing classifications or not.

"That every person in the District of Columbia who shall be convicted of vagrancy under the provisions of this act shall be required to enter into security in a sum not exceeding five hundred dollars, conditioned upon his good behavior and industry for the period of one year, and if he shall fail to give such security he shall be committed to the workhouse in the said District for a term not to exceed one year. The security herein mentioned shall be in the nature of a recognizance to the District of Columbia with a surety or sureties to be approved by the police court of the said District, in which court all prosecutions under this act shall be conducted in the manner now provided by law for the prosecution of offenses against the laws and ordinances of the said District, but nothing contained in section forty-four of the Code of Law for the District of Columbia shall be so construed as to create or give to the accused, in prosecutions under this act, any right to trial by jury not existing by force of the Constitution of the United States."

THE SAID ACT OF CONGRESS OF MARCH 3, 1909, IS CONSTITUTIONAL.

In many States statutes expressly confer upon justices of the peace and police magistrates jurisdiction in vagrancy cases and authorize them to convict and punish vagrants in a summary manner (22 Enc. Pl. & Pr., 508).

Powelson *vs.* Lockwood, 82 Cal., 613.

In re Fife, 110 Cal., 8.

State *vs.* Glenn, 54 Md., 572.

People *vs.* Forbes (Sup. Ct.), 4 Park. Crim. (N. Y.), 611.

People *vs.* Phillips, I Edm. Sel. Cas. (N. Y.), 386.

Walcott *vs.* Bachman, 3 Wyo., 336.

> "The legislature may provide for summary proceedings in the police court, without a jury in cases of such petty offenses as were thus provided for in certain early English statutes, and in cases which are intrinsically of similar nature and degree; and vagrancy is one of such offenses, for a summary trial of which without a jury the legislature may provide by a general law."
>
> *In re* Fife, 110 Cal., 8, citing *Ex p.* Wong You Ting, 106 Cal., 296.

In State *vs.* Maxcy, I McMull L. (S. Car.), 501, the court held that the power conferred upon justices by the act of 1836 in regard to vagrants was no violation of the constitutional provisions that "no man shall be deprived of his life, liberty of property but by the judgment of his peers or by the law of the land" and that the trial by jury as heretofore used in this State "shall be forever inviolably preserved."

If the proceeding is according to the course of the common law it is sufficient. The common law requires information or charge, and the defendant must have the opportunity to make his defense.

In this case, the defendant's rights were all protected. He had his day in court; was represented by counsel; presented his defense and the lower court found the facts against his contentions.

It is respectfully submitted that the judgment of the lower court should be affirmed.

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Defendant in Error.